

LAW OFFICES

STRANG, FLETCHER, CARRIGER, WALKER, HODGE & SMITH, PLLC

CARLOS C SMITH
WILLIAM C CARRIGER
RICHARD T HUDSON
FREDERICK L HITCHCOCK
EWING STRANG
LARRY L CASH +
CHRISTINE MABE SCOTT +
J ROBIN ROGERS # +
G MICHAEL LUHOWIAK
JAMES L CATANZARO, JR +
GREGORY D WILLETT
MARK W SMITH +
TIMOTHY H NICHOLS
OF COUNSEL
F THORNTON STRANG
ROBERT KIRK WALKER

400 KRISTAL BUILDING
ONE UNION SQUARE
CHATTANOOGA, TENNESSEE 37402-2514
TELEPHONE 423-265-2000
FACSIMILE 423-756-5861

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OFFICE OF THE
EXECUTIVE SECRETARY

S BARTOW STRANG
1882-1954
JOHN S FLETCHER
1879-1961
JOHN S CARRIGER
1902-1989
JOHN S FLETCHER JR
1911-1974
ALBERT L HODGE
1910-1997
* ALSO LICENSED IN GEORGIA
ALSO LICENSED IN ALABAMA
+ ALSO LICENSED IN ARIZONA

November 3, 1998

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Application of the Electric Power Board of Chattanooga
for a Certificate of Public Convenience and Necessity
to Provide Intrastate Telecommunications Services --
Docket No. 97-07488

Dear Mr. Waddell:

We are enclosing the original and thirteen copies of the
Post-Hearing Brief filed on behalf of the Electric Power Board of
Chattanooga.

Sincerely yours,



William C. Carriger
For the Firm

WCC:as
Enclosures
cc: Parties of Record
88925

BEFORE THE
| TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

APPLICATION OF ELECTRIC)
POWER BOARD OF CHATTANOOGA)
FOR A CERTIFICATE OF PUBLIC) Docket No. 97-07488
CONVENIENCE AND NECESSITY)
TO PROVIDE INTRASTATE)
TELECOMMUNICATIONS SERVICES)

POST-HEARING BRIEF OF
THE ELECTRIC POWER BOARD OF CHATTANOOGA

This post-hearing brief is submitted on behalf of the Electric Power Board of Chattanooga ("Electric Power Board") in support of its Application filed on October 21, 1997, and its Restated Application filed on September 4, 1998, for a Certificate of Public Convenience and Necessity to become a competing telecommunications service provider. (Unless specifically identified, the original Application and the Restated Application will be collectively referred to as the "Application").

INTRODUCTION

A. Electric Power Board of Chattanooga

The Electric Power Board is an independent Board of the City of Chattanooga, Tennessee, a Tennessee municipal corporation. The Electric Power Board was originally created under Chapter 455 of the Private Acts of the 1935 Tennessee General Assembly and currently provides retail electric power to both business and residential customers in the City of Chattanooga, most of Hamilton County, Tennessee, parts of Bledsoe, Bradley, Marion, Rhea, and

Sequatchie Counties in Tennessee¹; and parts of Catoosa, Dade and Walker Counties in Georgia. The Electric Power Board's principal office is in Chattanooga, Tennessee. (T.¹ at 27-5).

The Private Act Enabling Legislation, as amended, created the Electric Power Board as an operationally-distinct Board of the City of Chattanooga. The Board of the Electric Power Board is vested with the "exclusive management and control of the operation" of the Electric Power Board. The Board of the Electric Power Board consists of five (5) members whose replacements are subject to confirmation by the Mayor and City Council of the City of Chattanooga. (*Id.*).

The Electric Power Board purchases all of its requirements of electricity at wholesale from the Tennessee Valley Authority ("TVA"), a federal corporation created pursuant to the Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831, *et seq.* As a distributor of TVA electricity, the rates and terms and conditions upon which that electricity is sold are matters subject to regulation by TVA under the TVA Act. 16 U.S.C. § 831i.

The Electric Power Board has created a separate Telecommunications Division of the Electric Power Board to conduct the Electric Power Board's telecommunications operations, and this proceeding is to consider the Electric Power Board's pending Application.

¹The abbreviation "T." shall denote the Transcript of Proceedings of the hearing held in this matter on October 13, 1998. Transcripts of all other hearings and status conferences shall be denoted "Transcript," followed by the date of the specific hearing.

B. The Regulatory Background

As the Directors well know, at the beginning of Tennessee Public Acts of 1995, Chapter No. 408 (for convenience referred to herein as the "Telecommunications Act of 1995"), the Tennessee Legislature adopted a telecommunications policy which stated in part:

The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets

Tennessee Code Annotated § 65-4-123.

The Tennessee Regulatory Authority has spent considerable time and effort in implementing this policy, including receiving, hearing, and approving numerous Applications for a Certificate of Public Convenience and Necessity by competing telecommunications service providers.

In 1997, the Tennessee Legislature, following the stated policy of fostering competition, authorized municipal electric systems to offer telecommunications services by enacting Chapter 531 of the Public Acts of 1997, as codified in Tennessee Code Annotated §§ 7-52-401, et seq., (which will be referred to for convenience as the "Municipal Telecommunications Act").

The Legislature, in enacting the Municipal Telecommunications Act, stated in relevant part:

[T]o the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee [R]egulatory [A]uthority in the same manner and to the same extent as other certificated providers of

telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such municipality's provision of telephone, telegraph and communication services.

Tennessee Code Annotated § 7-52-401.

Based on the requirements of Tennessee Code Annotated § 7-52-401 and wishing to offer telecommunications services to individuals and businesses in the Chattanooga area, the Electric Power Board has filed its Application in order that it may serve as a competing telecommunications service provider, which is sometimes referred to as a competing local exchange carrier.

On October 13, 1998, the Directors held a hearing on the Application at which time the Electric Power presented and the Authority received testimony from the following witnesses:

Harold E. DePriest
President and Chief Executive Officer
Electric Power Board of Chattanooga

Robert W. Nyswaner
Chief Financial Officer
Globe Telecommunications, Inc.

Douglas A. Dawson
Principal
Competitive Communications Group, LLC

Rose M. Baxter
Vice President
Accounting Division
Electric Power Board of Chattanooga

Ronald N. Fugatt
Executive Vice President
Electric Power Board of Chattanooga

Tennessee Cable Telecommunications Association presented one witness:

William J. Barta
Henderson Ridge Consulting, Inc.

Two other intervenors participated at the hearing, but presented no witnesses.

ARGUMENT

In Section 1 of this Post-Hearing Brief, the Electric Power Board will show that it has met the statutory requirements to obtain a Certificate of Public Convenience and Necessity. Section 2 of the Post-Hearing Brief will show that the Electric Power Board has resolved issues relating to cross-subsidization. Section 3 of this Post-Hearing Brief will show that the contract between the Electric Power Board and Globe Telecommunications, Inc. ("Globe") is very clearly a permissible business relationship. Finally, Section 4 of this Post-Hearing brief will show that Globe is not required to obtain a Certificate of Public Convenience and Necessity in order to perform its obligations under its contract with the Electric Power Board.

1. The Electric Power Board has Clearly Met the Statutory Requirements to Obtain a Certificate of Public Convenience and Necessity.

In order to obtain a Certificate of Public Convenience and Necessity, the Electric Power Board must satisfy the same statutory requirements as apply to other certificated providers of telecommunications services. Tennessee Code Annotated § 7-52-401. Therefore, the Electric Power Board must demonstrate that it will adhere to all applicable policies, rules and orders of the

Tennessee Regulatory Authority, Tennessee Code Annotated § 65-4-201(c)(1); the Electric Power Board must possess sufficient managerial, financial, and technical abilities to provide the applied-for services, Tennessee Code Annotated § 65-4-201(c)(2); and the small and minority-owned telecommunications business participation plan of the Electric Power Board must satisfy the requirements of Tennessee Code Annotated § 65-5-212. If the Electric Power Board makes such a showing, then this Authority should grant the Electric Power Board a Certificate of Public Convenience and Necessity, as it would for any other certificated provider. The Electric Power Board has clearly shown that it meets each of the above statutory requirements, and, importantly, none of the intervenors contested these primary issues by filing testimony or in their cross-examination of the Electric Power Board's witnesses.

A. The Electric Power Board Has Demonstrated that It Will Adhere to All Applicable Policies, Rules and Orders of the Tennessee Regulatory Authority.

The Electric Power Board clearly satisfies the requirements of Tennessee Code Annotated § 65-4-201(c)(1), as the pre-filed testimony of Harold E. DePriest, President and Chief Executive Officer of the Electric Power Board, shows. Mr. DePriest has testified that the Electric Power Board will adhere to all applicable policies, rules and orders of the Authority (T. at 27-8 & 27-14).

B. The Electric Power Board Has Demonstrated that It Possesses Sufficient Managerial, Financial, and Technical Abilities to Provide the Applied-For Services.

The Electric Power Board clearly satisfies the requirements of Tennessee Code Annotated § 65-4-201(c)(2), as its undisputed pre-filed testimony shows. The Electric Power Board possesses sufficient managerial, financial, and technical abilities to provide the applied-for services.

The Electric Power Board has operated as a facilities-based utility for over 60 years and has the managerial abilities to provide the applied-for services. As the prefiled direct testimony of Mr. DePriest shows, the Electric Power Board has substantial managerial experience in all necessary areas of the telecommunications business, including engineering, operations, customer service, and marketing. (T. at 27-9 - 27-10). Even though this managerial expertise would alone be sufficient to satisfy the requirements of Tennessee Code Annotated § 65-4-201(c)(2), the Electric Power Board has also contracted with Globe and Competitive Communications Group, LLC ("CCG") to supplement the Electric Power Board's existing managerial expertise. (See T. at 27-10 - 27-13; T. 71-7 - 71-8 (describing Globe supplemental assistance); T. at 88-9 - 88-12 (describing CCG supplemental assistance)).

Similarly, the Electric Power Board has shown that it possesses sufficient technical abilities to provide the applied-for services. For example, as Ronald N. Fugatt, Executive Vice-President of the Electric Power Board has testified, the Electric

Therefore, the Electric Power Board has clearly demonstrated that it possesses sufficient managerial, financial, and technical abilities to provide the applied-for services in accordance with the requirements of Tennessee Code Annotated § 65-4-201(c)(2).

C. The Electric Power Board has Adopted an Appropriate Small and Minority-Owned Telecommunications Business Participation Plan.

The Board of the Electric Power Board adopted a small and minority-owned business plan on August 28, 1998, which applies to all the operations of the Electric Power Board. (T. at 27-14). This small and minority-owned business plan is attached as Exhibit F to the Restated Application, and the plan satisfies the requirements of Tennessee Code Annotated § 65-5-212.

Accordingly, the Electric Power Board has clearly and indisputably shown that it satisfies the statutory requirements applicable to other providers of telecommunications services. Therefore, the Authority should grant the Electric Power Board a Certificate of Public Convenience and Necessity as requested in the Restated Application.

2. The Electric Power Board Has Resolved Issues Relating to Cross-Subsidization.

Following a hearing on April 23, 1998, the Electric Power Board and the Tennessee Cable Telecommunications Association ("TCTA"), through its legal counsel and consultants, began negotiating a joint proposal to address matters relating to cross subsidization. The Hearing Officer held a Status Conference on August 5, 1998, to review the status of the proceeding. At that Status Conference, counsel for the Electric Power Board and counsel

Power Board has already installed and operated a 10-mile fiber optic loop for its own internal purposes. (T. at 106-3 - 106-6). Mr. Fugatt also has testified about the Electric Power Board's impressive technical accomplishments in a facilities-based utility industry, which has created a skill set that is easily transferable to its telecommunications operation, and Mr. Fugatt has also testified regarding the Electric Power Board's impressive engineering resources. (T. at 106-9 - 106-12). The Electric Power Board's relationships with CCG and with Globe will also supplement its already impressive technical abilities. (T. at 106-6 - 106-8; See T. at 71-7 - 71-8 (describing supplemental Globe technical assistance); T. at 88-12 - 88-13 (describing CCG supplemental technical assistance)).

Finally, the Electric Power Board has demonstrated that it possesses sufficient financial abilities to provide the applied-for services. As of June 30, 1998, the Electric Power Board has total assets of 290 million dollars, current assets of 82 million dollars, no long-term debt and current liabilities of less than 66 million. (T. at 27-7, 27-17, 27-18 and Late Filed Exhibit 1). As Mr. DePriest further testified, the Board of the Electric Power Board has authorized an inter-divisional loan to the Telecommunications Division of up to \$10,000,000. (T. at 27-5). This loan will be structured to allow the Telecommunications Division to draw funds on an as-needed basis, and the Electric Power Board clearly has the financial ability to fund this inter-division loan. (T. at 27-6 - 27-8).

for TCTA announced to the Hearing Officer that the parties were close to completing a joint filing that would address the cross-subsidization issues in great detail. [Transcript at 8-9 (August 4, 1998)]. Following the Status Conference, on August 26, 1998, the Hearing Officer filed his Report establishing a filing schedule and setting the date for the October 13, 1998 Hearing.

After further extensive negotiations, on September 9, 1998, the Electric Power Board and TCTA completed and filed their Proposed Conditions to Certificate of Public Convenience and Necessity to Ensure Statutory Compliance (the "Proposed Conditions"). With three exceptions, the Electric Power Board and TCTA agreed upon the Proposed Conditions as the appropriate approach to all cross-subsidization issues. Then, on September 18, 1998, TCTA filed the rebuttal testimony of William J. Barta that raised several new issues regarding the Proposed Conditions. Between the filing of Mr. Barta's rebuttal testimony and the October 13, 1998 hearing, the Electric Power Board and TCTA negotiated further revisions to the Proposed Conditions.

On October 13, 1998, the Directors held the hearing on the Application. At this hearing, counsel for TCTA and the Electric Power Board submitted their Revised Proposed Conditions to Certificate of Public Convenience and Necessity to Ensure Statutory Compliance (the "Revised Proposed Conditions"). The Revised Proposed Conditions contained only one area of dispute between the Electric Power Board and TCTA relating to the appropriate allocator for the Electric Power Board's human resources expenses, as noted in footnote 2 of the Revised Proposed Conditions. Otherwise, as

counsel for TCTA acknowledged at the October 13, 1998 hearing, the Revised Proposed Conditions "take[] care of the cross-subsidy issues with the exception of one outstanding disagreement.. It takes care of the cross-subsidy issues which we raised back in April . . . and the requirements of Title [7]." (T. at 5).

Since the October 13, 1998, hearing, the parties have worked on additional revisions to the Revised Proposed Conditions (the "Second Revised Proposed Conditions"). Before addressing the Second Revised Proposed Conditions, however, the Electric Power Board restates its legal position, first asserted in its March 13, 1998 Pre-Hearing Brief, that the Tennessee General Assembly clearly intended that the Electric Power Board would be regulated in the same manner and to the same extent as other certificated providers of telecommunications services. Tennessee Code Annotated § 7-52-401. While cross-subsidization may be a legitimate regulatory concern, the Electric Power Board respectfully submits that this concern would be the primary concern of the regulator of the industry whose ratepayers could be forced to bear the costs of cross-subsidization. In the case of BellSouth, those customers would be local exchange customers of BellSouth, particularly where BellSouth is not subject to effective competition. Indeed, both Tennessee Code Annotated § 65-5-208 and the Federal Communications Commission's cost allocation and accounting safeguard dockets, such as Common Carrier Docket No. 96-150, seek to protect customers of incumbent local exchange carriers from subsidizing the costs of competitive ventures. In the case of the Electric Power Board, the

regulatory concern² relates to the protection of electric system customers. The Electric Power Board respectfully submits that these are matters under the jurisdiction of TVA and the Electric Power Board's local Board, just as the enforcement of provisions under the TVA Wholesale Power Contract and compliance with Tennessee statutes relating to municipal electric systems fall under the jurisdiction of TVA and the local governing boards, respectively.

In fact, a close review of the prefiled testimony of Mr. William J. Barta, filed on behalf of TCTA, reveals that protection of electric system customers is his concern as well. (See, e.g., T. at 126-7 - 126-8, 126-11; T. at 126-22 - 126-24). As Mr. Barta candidly admitted at the October 13, 1998 hearing, he was unaware that the electric system of the Electric Power Board is regulated by TVA and is not regulated by this Authority. (T. at 127-28).

²This regulatory concern, if any, must be distinguished from regulatory concerns relating to private for-profit entities. Historically, investor-owned utilities have offered monopoly services for which their customers have had no recourse except under the authority of a regulatory body such as this Authority. Regulatory bodies such as this Authority have prevented investor-owned utilities from earning excessive returns for the benefit of their stockholders at the expense of their captive customers. On the other hand, the Electric Power Board is not-for-profit and, as a public power utility, its customers are its beneficial owners. Because the "stockholders" of the Electric Power Board are its customers, the Electric Power Board does not have an incentive to take advantage of its consumer-owners to provide other services, since the benefits of these other services would accrue to these consumer-owners as well. Indeed, to the extent that any cross-subsidization rules eliminate efficiencies between the Electric Power Board's electric system and Telecommunications Division (such as economies of scale) those costs fall directly upon the consumer-owners of the Electric Power Board.

Nonetheless, the Electric Power Board has always intended to avoid subsidization of the Telecommunications Division by the electric system. Accordingly, the Electric Power Board willingly negotiated the Proposed Conditions, the Revised Proposed Conditions, and is now working on the Second Revised Proposed Conditions. The Electric Power Board would submit that these Conditions appropriately address all the Tennessee statutory requirements and, to the extent applicable, are consistent with the Tools and Conditions Needed to Prevent Cost Shifting and Cross Subsidization Between Regulated and Non-Regulated Affiliates (T. at 126-55) and with Federal Communications Commission's CC Docket No. 96-150.

The process of drafting and revising these Conditions has allowed the Electric Power Board to establish a clear methodology to avoid cross-subsidization and to put in place reporting requirements for its own internal use as well as both the Tennessee Regulatory Authority and the TVA.

Therefore, the Electric Power Board submits that any issues relating to cross-subsidization have been satisfactorily answered, and no such issue should delay in any respect the Tennessee Regulatory Authority's granting the Certificate of Public Convenience and Necessity.

3. The Contract Between the Electric Power Board and Globe is a Permissible Business Relationship.

The Tennessee General Assembly, in enacting the Municipal Telecommunications Act, intended that the Electric Power Board would have the same powers as do other entities providing

telecommunications services in Tennessee. The contract between the Electric Power Board and Globe is consistent with this statutory authorization. The Authority need not address, however, whether the Tennessee law authorizes the Electric Power Board to enter into a partnership or a joint venture with Globe, since the contract clearly does not create either relationship.

A. The Tennessee General Assembly Clearly Authorized the Contract Between the Electric Power Board and Globe.

Tennessee Code Annotated § 7-52-403(a) granted the Electric Power Board "all the powers" of other entities providing telecommunications services in the state. That statute provides, in relevant part:

To the extent that it provides any of the services authorized by § 7-52-401, a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the state of Tennessee

Tennessee Code Annotated § 7-52-403(a).

The Tennessee General Assembly could not have been clearer in its grant to the Electric Power Board of "all the powers" granted other entities providing telecommunications services in Tennessee. This plain statutory authorization refutes the suggestion of TCTA counsel that the Electric Power Board lacks statutory authority to contract with Globe (T. at 157). As TCTA counsel acknowledged, "if these two entities were anybody else, if they were BellSouth, if it was anybody else other than a city, we wouldn't be talking about this I submit to you that you won't find anything, at least in terms of enabling legislation passed by the General

Assembly, that addresses that issue." (T. at 157-58). Contrary to TCTA counsel's assertion, the Tennessee General Assembly did address this issue, and if other telecommunications providers are authorized to enter into such an agreement, then the Electric Power Board can do so also.

The agreement between the Electric Power Board and Globe plainly creates an independent contractor relationship between the parties, and under the agreement Globe acts as a vendor of switching and billing services and a customer care platform, as well as a consultant in certain aspects of the start-up business. The performance incentive compensation, based upon 5.5 percent of gross revenues (subject to certain minimum payments), is simply designed to encourage Globe to work very hard to assist the Electric Power Board in developing and growing the Electric Power Board's start-up business. (T. at 50-52).

Performance incentive compensation provisions are commonplace in the telecommunications industry. Indeed, a telecommunications provider's compensation package for its sales representatives will likely include some form of commission based upon a percentage of revenues attributable to the representative's customers. Many management contracts include a performance incentive provision or other sharing of gross revenues.³ The validity of the contract

³For example, on October 12, 1998, the State of Tennessee Department of Finance and Administration issued its Tennessee Information Infrastructure (TNII) Request for Proposal (RFS#:317.03.001) which included under Section 8.1.2 a "revenue sharing" pro forma contract for prospective bidders to consider. Clearly, by accepting a percentage of gross revenues from the TNII project, the State of Tennessee would not become a joint venturer or partner with the successful bidder for the TNII project.

between the Electric Power Board and Globe is not altered by the conclusory allegations of TCTA that the contract is a contract of partnership or of joint venture. The Authority need not even consider whether there are any state law limitations on the statutory authorization under Tennessee Code Annotated § 7-52-403(a) of the Electric Power Board to enter into partnerships and joint ventures, since the contract between the Electric Power Board and Globe is neither a partnership nor a joint venture.

B. The Contract Between the Electric Power Board and Globe Does Not Create a Partnership.

Very clearly, the contract between the Electric Power Board and Globe does not create a partnership under Tennessee law. Under Tennessee law, "a partnership is an association of two (2) or more persons to carry on as coowners of a business for profit." Tennessee Code Annotated § 61-1-105(a). The Electric Power Board and Globe did not intend to create a partnership, are not coowners of a for-profit business, and do not share the profits from a joint enterprise. The burden of proof for establishing a partnership falls upon the party alleging a partnership. *Pettes v. Yukon*, 912 S.W.2d 709, 711 (Tenn. Ct. App. 1995). Neither TCTA nor any other intervenor have made such a showing.

The contract between the Electric Power Board and Globe expressly states that the parties did not intend to create a partnership. In Section 22.12 of the Agreement, the Directors will find the express intent of the parties that no partnership is to be created for any purpose.

The existence of a partnership depends upon the intention of the parties, and the controlling intention is the intention ascertainable from the acts of the parties. *Bass v. Bass*, 814 S.W.2d 38, 41 (Tenn. 1991). As the contract between the Electric Power Board and Globe shows, the parties did not intend to be co-owners or to share in the profits and losses of the operations of the Electric Power Board's Telecommunications Division. It is not enough that both the Electric Power Board and Globe have money and assets at risk or that their labor or skill will be required for operations of the Telecommunications Division. Instead, their money, assets, labor and skills must be combined for the purpose of sharing profits and losses between them. (*Id*). As the contract shows, the Electric Power Board and Globe did not intend to create, nor did they create a partnership between them.

Throughout the contract between the Electric Power Board and Globe, there is no evidence of any sharing of ownership or even any sharing of control over the Telecommunications Division of the Electric Power Board. To the contrary, both the Electric Power Board and Globe retain ownership over their respective assets. Neither party is given control over assets of the other. Indeed, with respect to the Telecommunications Division of the Electric Power Board, the Directors will find in Section 3.2 of the contract that the Electric Power Board retains the ultimate authority and control over the Telecommunications Division and the Start Up Business.

Similarly, the contract between the Electric Power Board and

Globe does not give Globe any interest in the profits (or losses) of the Electric Power Board's Telecommunications Division. See 59 Am.Jur. 2d, *Partnership*, §§ 165, 172 (1987) (requiring that partners share losses as well as profits). The Electric Power Board will pay Globe a percentage of the gross revenues of the Telecommunications Start Up Business, but Globe will not share in the net income nor in any of the losses. While the receipt of a share of the profits of the Telecommunications Division would be *prima facie* evidence that a partnership existed, Tennessee Code Annotated § 61-1-106(4), the payment to Globe of a small percentage of gross revenues does not create a partnership relationship.

The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived

Tennessee Code Annotated § 61-1-106(3).

The percentage payment in the Globe Contract is analogous to percentage rent provisions in many commercial leases that provide for payment to the landlord a percentage of the gross revenues of the tenant. No partnership would be created in such instances, nor is one created here.

Because Globe does not share in the profits and losses of the Telecommunications Division, Globe does not have ownership or control over the assets of the Telecommunications Division of the Electric Power Board, and the expressed intent that no partnership is created, the contract between the Electric Power Board and Globe cannot create a partnership.

C. The Contract Between the Electric Power Board and Globe Does Not Create a Joint Venture.

Under the same analysis, the contract between the Electric Power Board and Globe is clearly not a joint venture either. Under long-standing Tennessee law, a joint venture is governed by the same rules as are applicable to partnerships. *Federated Stores Realty, Inc. v. Huddleston*, 852 S.W.2d 206, 212 (Tenn. 1992). For the reasons set forth above, TCTA will be unable to carry its burden under this argument as well.

Importantly, Globe has no control over the operations of the Telecommunications Division of the Electric Power Board. This fact alone prohibits a finding of joint venture. In *Cecil v. Hardin*, 575 S.W.2d 268, 271 (Tenn. 1975), the Court emphasized the degree of control that would be necessary to establish a joint venture (and a partnership), stating:

The elements that need to be shown to establish a joint venture among several parties [include] . . . an equal right on the part of each to control the venture as a whole and any relevant instrumentality.

See 46 Am. Jur. 2d, *Joint Ventures*, § 9 (1994) ("While every element is not necessarily present in every case, it is generally agreed that in order to constitute a joint venture there must be a community of interest and a right to joint control.").

As is discussed in Section 2.B., above, the Board of the Electric Power Board retained ultimate control and authority over the operations of the Telecommunications Division. Globe has no right at all, much less an equal right, to control the Telecommunications Division of the Electric Power Board or any of its telecommunications operations. Therefore, the Electric Power

Board did not give Globe the necessary control over the Telecommunications Division operations to create a joint venture (or a partnership).

4. Globe is Not Required to Obtain a Certificate of Public Convenience and Necessity to Perform its Obligations Under its Contract with the Electric Power Board.

The contractual obligations of Globe under its contract with the Electric Power Board do not make Globe either a competing telecommunications service provider or a provider or offeror of telecommunications services. Accordingly, Globe is not required to obtain a Certificate of Public Convenience and Necessity under Tennessee Code Annotated § 65-4-201. To the contrary, Globe merely provides certain components of the Electric Power Board's telecommunications service offering. Globe has no customers, nor does Globe offer its services to the public at large. This interpretation is consistent with the definition of "public utility" under Tennessee Code Annotated § 65-4-101(a).

Globe does not offer or provide telecommunications services. Under Title 65, "no individual or entity shall offer or provide any individual or group of telecommunications services" without a Certificate of Public Convenience and Necessity, Tennessee Code Annotated § 65-4-201(b), and Tennessee Code Annotated § 65-4-201(c) provides the standards for a "competing telecommunications service provider" to obtain a Certificate of Public Convenience and Necessity. The definition of "competing telecommunications service provider" reveals that the authorized regulation is for entities that provide services directly to the public, rather than for entities providing certain services to an entity that will, in

turn, provide other services directly to the public. The term "competing telecommunications service provider" is defined, in relevant part as:

"Competing telecommunications service provider" means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services

Tennessee Code Annotated § 65-4-101(e).

This definition focuses on the offering or provision of the actual telecommunications service, and does not regulate merely one component of that service or extend to the provision of services ancillary to the provision of telecommunications services. Under the terms of its contract with the Electric Power Board, Globe provides the switching component of a service that the Electric Power Board will provide directly to the public. The Authority would not exercise regulatory jurisdiction over the participation of alternative vendors such as Lucent or Nortel in a contract with the Electric Power Board for the leasing and maintenance of the switch. (Similarly, the Authority would not exercise regulatory jurisdiction over a provider of billing services or a provider of a customer care software platform or a provider of telecommunications consulting services). Neither should the Authority exercise regulatory jurisdiction over Globe's provision of a switch or ancillary services to the Electric Power Board.

This interpretation is consistent with the definition of "telecommunications services" as gleaned from other provisions within Title 65, and, analogously, from federal law. These additional provisions, like the plain language defining "competing

telecommunications service provider," show that the authorized regulation covers the provision of services to the public at large, rather than the provision of one or more components of those services to the Electric Power Board, who will offer telephone service to the public. While Title 65 of Tennessee Code Annotated does not expressly define "telecommunications services," other provisions within Title 65 provide a clear understanding of the focus of this term. For example, in Tennessee Code Annotated § 65-5-208, the Tennessee General Assembly defined "basic local exchange telephone services" to include "telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute." Tennessee Code Annotated § 65-5-208(a)(1). These "basic local exchange telephone services" plainly relate to services provided directly to the public at large. In addition, the definition of "non-basic services" provided in Tennessee Code Annotated § 65-5-208(a)(2) defines these services as the remainder of "telecommunications services which are not defined as basic local exchange telephone services and are not exempted under [Tennessee Code Annotated § 65-5-208(b)]." Tennessee Code Annotated § 65-5-208(a)(2). Read together, these definitions should encompass all "telecommunications services." As these statutes clearly reflect, each of the listed services is a

service provided directly to the public, rather than a service provided to a competing telecommunications service provider.

The definition of "telecommunications services" under the federal Telecommunications Act of 1996 also clearly shows that the term relates to services offered directly to the public. At 47 U.S.C. § 153(46), the term "telecommunications service" is defined as follows:

The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Under the federal definition, Globe does not provide "telecommunications service," since it does not provide any services for a fee directly to the public. Similarly, switching services (such as the services that Globe provides) only involve one aspect of the provision of "telecommunications," as defined in the federal statute. See 47 U.S.C. § 153(43) ("The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.").

This interpretation is also consistent with the long-standing definition of "public utility" under Tennessee law, which shows that the Tennessee General Assembly did not intend the definition of "telecommunications services" to extend beyond those services provided directly to the public. The term "public utility" is defined at Tennessee Code Annotated § 65-4-101(a) as follows:

"Public Utility" includes every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees or receivers . . . that own, operate, manage or control, within the state, . . . telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof

Globe does not offer any telephone, telegraph, or telecommunications services or operate any other like system, plant or equipment that is dedicated to the public use, nor does it operate under or is it required to obtain any state or local franchise in Tennessee. Since Globe does not offer any services directly to the public, it is not a "public utility." See *Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 480 (Tenn. 1946), *appeal dismissed* 329 U.S. 670 (holding "it abundantly clear that in our decisions, the terms 'public use' and 'public utility' are synonyms"). Globe does not make the switch available to the public nor is Globe required to obtain any state or local franchises in order to provide switching and billing services or a customer care platform to the Electric Power Board. Globe, therefore, is not a public utility.

Because Globe provides only a component of the services necessary for the Electric Power Board to provide telecommunications services to customers of the Telecommunications Division, because Globe provides services only to the Electric Power Board, because Globe will neither have customers nor offer services directly to the public under its contract with the Electric Power Board, and because all contacts with the public are

by the Electric Power Board, Tennessee law does not require that Globe obtain a Certificate of Public Convenience and Necessity.

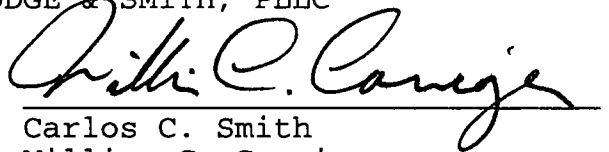
CONCLUSION

For the foregoing reasons, the Authority should grant the Application of the Electric Power Board and should issue a Certificate of Public Convenience and Necessity to the Electric Power Board as requested therein.

Respectfully submitted,

STRANG, FLETCHER, CARRIGER, WALKER,
HODGE & SMITH, PLLC

By:



Carlos C. Smith
William C. Carriger
Mark W. Smith
400 Krystal Building
One Union Square
Chattanooga, Tennessee 37402
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and exact copy of the within and foregoing pleading on behalf of the Electric Power Board of Chattanooga, via United States mail, first class postage prepared and properly addressed to the following:

Dennis P. McNamee, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Guy M. Hicks, General Counsel
BellSouth Communications, Inc.
333 Commerce Street
Suite 2101
Nashville, Tennessee 37201-3300

Val Sanford, Esquire
Gullett, Sanford, Robinson & Martin
P.O. Box 198888
Nashville, Tennessee 37219-8888

James P. Lamoureux, Esquire
AT&T Communications of the South Central States, Inc.
1200 Peachtree Street N.E.
Room 4060
Atlanta, Georgia 30309

Charles B. Welch, Jr., Esquire
Farris, Mathews, Gilman, Branan & Hellen, P.L.C.
2400 Nashville City Center
511 Union Street
Nashville, Tennessee 37219

Vance L. Broemel, Esquire
Assistant Attorney General
Consumer Advocate Division
Cordell Hull Building
Second Floor
425 Fifth Avenue, North
Nashville, Tennessee 37243-0500


Henry Walker, Esquire
Attorney for ACSI & NextLink
Boult, Cummings, Conners & Berry
P.O. Box 198062
Nashville, Tennessee 37219

Dana Shaffer, Esquire
NextLink Tennessee, LLC
105 Malloy Street, Suite 300
Nashville, Tennessee 37201

Jon E. Hastings, Esquire
Boult, Cummings, Conners & Berry
P. O. Box 198062
Nashville, Tennessee 37219

Michael R. Knauff
Tennessee Power Company
4612 Maria Street
Chattanooga, Tennessee 37411

This 3rd day of November, 1998.


For: Strang, Fletcher, Carriger,
Walker, Hodge & Smith, PLLC

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